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91-2008

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANTHONY P. MURPHY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

Petition for a Writ of Certiorari to The Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state prosecutor from peremptorily striking venirepersons solely on the basis of gender.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992) 6

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C. Darrow, *Attorney for the Defense*, 8 Esquire 35 (1936) 8
Estimate of Rape Victims Is Quintupled, The Washington Post, April 24, 1992 at 20 7
F. Bailey & H. Rothblatt, *Successful Techniques for Criminal Trials* (1971) 8
Federal Bureau of Investigation, *Crime in the United States*, Uniform Crime Reports 1990 (1991) 7
J. Gobert & W. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* (2d ed. 1990) 8
National Institute of Justice, *When The Victim Is A Child* (2d ed.) 7
U.S. Bureau of the Census, *Statistical Abstract of the United States: 1991* (111th ed. 1991) 7

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Petitioner,

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STATE OF ALABAMA,

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Petition For A Writ Of Certiorari To The Alabama Court Of Criminal Appeals

---

PETITION FOR A WRIT OF CERTIORARI

Anthony P. Murphy respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

The Alabama Supreme Court's denial of a writ of certiorari (App. 1a) is reported at 596 So.2d 45. The opinion of the Alabama Court of Criminal Appeals (App. 8a) is reported at 596 So.2d 42. The denial of the application for rehearing by the Court of Criminal Appeals (App. 15a) is unreported.

JURISDICTION

The Alabama Supreme Court's denial of a writ of certiorari was entered on March 20, 1992 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner, a white male, was indicted in Montgomery County, Alabama on charges of sodomy in the first degree and sexual abuse in the first degree on September 4, 1987. The trial on these charges was held on October 22-23, 1990, in Montgomery County Circuit Court. On the first day of trial, the court conducted *voir*

dire examination of the venire. The venire consisted of twenty-three females and ten males. R. 70.[1] The court excused two female jurors for cause and excused a male juror to reduce the venire to thirty members. R. 78, 102-03, 129. The venire thus consisted of twenty-one females and nine males.

Both the defense and the State were entitled to nine peremptory challenges. R. 129-130.[2] The State used its nine peremptory challenges to strike five of the nine male venirepersons.[3] The petit jury ultimately seated consisted of eleven females and one male. R. 133-34.

Defense counsel moved to discharge the jury before it was sworn on the ground, among others,[4] that the State's removal of male venirepersons violated petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment. R. 133-35. The trial court summarily denied the motion without a hearing and without requiring the State to articulate any rationale for its peremptory challenges. R. 138.

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[1] "R" refers to the transcript of the trial. A copy of that transcript has been lodged with the Clerk for the Court's convenience.

[2] The Alabama Rules of Criminal Procedure do not specify a particular number of strikes. Rather, each side alternately strikes potential jurors until twelve (12) remain on the jury list. *See* Ala. R. Crim. P. 18.4(f).

[3] Defense counsel used his peremptory challenges to strike seven females and one male. R. 138.

[4] Defense counsel also moved to discharge the jury on the ground that it contained only one black juror. The trial court denied this motion as well. R. 132-34.

The jury convicted Petitioner on both counts. Petitioner was sentenced to life imprisonment on the sodomy count and ten years on the sexual abuse count, the sentences to run consecutively. App. 8a. On appeal, the Alabama Court of Criminal Appeals affirmed. The court summarily rejected Petitioner's constitutional argument with the statement that "[t]he law currently states that *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] does not extend to gender-bases strikes." App. 9a. (citing Alabama Court of Criminal Appeals precedents).

The Court of Criminal Appeals denied without opinion Petitioner's application for rehearing on November 15, 1991, App. 15a, and the Supreme Court of Alabama denied *per curiam* Petitioner's request for a writ of certiorari on March 20, 1992. App. 1a. Justice Maddox, joined by Justices Adams and Ingrams, dissented from the denial of the writ on the ground that the principles enunciated in *Batson* do apply to gender-based peremptory strikes. App. 1a.

REASONS FOR GRANTING THE PETITION

Batson v. Kentucky, 476 U.S. 79 (1986) left open whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state prosecutor from peremptorily striking venirepersons on the basis of classifications other than race. More specifically, *Batson* did not decide whether a venireperson may be excluded from participation on a criminal jury based solely on gender. There is a clear and irreconcilable conflict on this issue among the federal circuits and state courts which have

already addressed it.[5] Whether *Batson* applies to gender arises frequently in the criminal justice system and with particular piquancy in prosecutions involving sex-related crimes. The decision below, if allowed to stand, would sanction invidious discrimination in jury selection, undermine public confidence in the fairness of sex-crime prosecutions, and condemn defendants to trial before gender-skewed juries. Only this Court can resolve the issue and provide appropriate guidance to the courts below.

1. The conflict on whether *Batson* applies to gender-based peremptory strikes has arisen swiftly and starkly, not only among the federal circuits but also among many state supreme and appellate courts. In *United States v. De Gross*, 1992 WL 63082 (April 2, 1992) (en banc), the Ninth Circuit, relying on *Batson*, reaffirmed an earlier panel decision that the Fifth Amendment's equal protection principles forbid sexually discriminatory peremptory strikes. Several state courts have agreed with the Ninth Circuit that the *Batson* rationale applies to gender.[6]

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[5] *See, e.g., State v. Gonzalez*, 808 P.2d 40, 48 (N.M. Ct. App.) ("It is evident . . . that there is a split in authority on the issue of whether the equal protection clause of the United States Constitution prohibits use of peremptory challenges based on gender"), *cert. denied*, 806 P.2d 65 (N.M. 1991); *Hannan v. Commonwealth*, 774 S.W.2d 462, 463 (Ky. Ct. App. 1989) (noting that "decisions are conflicting").

[6] *See State v. Burch*, 1992 WL 108221 (Wash. Ct. App. May 26, 1992); *People v. Mitchell*, 1992 WL 97211 (Ill. App. Ct. May 12, 1992); *Di Donato v. Santini*, 283 Cal. Rptr. 751 (Cal. Ct. App. 1991). *See also State v. Pullen*, 811 S.W.2d 463, 467 (Mo. Ct. App. 1991) (stating "we feel that, logically, *Batson* should extend to gender based strikes," but following Missouri precedent that it does not). In addition, the courts of other states have held that gender-based peremptory strikes violate

In contrast to the Ninth Circuit, the Fourth and Seventh Circuits have held that the scope of *Batson* is limited to peremptory challenges based on race. *See United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988), *cert. dismissed sub nom. Washington v. United States*, 489 U.S. 1094 (1989), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992). *See also United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) (stating that while blacks qualify as a cognizable racial group under *Batson*, no showing had been made that black males constitute a distinct, recognizable subclass that has been singled out for different legal treatment), *cert. denied*, 481 U.S. 1037 (1987). The Alabama Court of Criminal Appeals[7] and the highest or appellate courts of several other states likewise have refused to apply *Batson* to gender-based strikes.[8]

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provisions of their state constitutions. *See, e.g., State v. Levinson*, 795 P.2d 845 (Haw. 1990); *Fields v. People*, 732 P.2d 1145 (Colo. 1987) (en banc); *State v. Gilmore*, 511 A.2d 1150 (N.J. 1986); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *State v. Gonzalez*, 808 P.2d 40; *People v. Blunt*, 574 N.Y.S.2d 812 (App. Div. 1991).

[7] *See Bankhead v. State*, 1992 WL 73109 (Ala. Crim. App. Feb. 28, 1992); *Fisher v. State*, 587 So.2d 1027 (Ala. Crim. App.), *writ denied*, 587 So.2d 1039 (Ala. 1991), *cert. denied*, 112 S. Ct. 1486 (1992); *Daniels v. State*, 581 So.2d 536 (Ala. Crim. App. 1990), *writ denied*, 581 So.2d 541 (Ala.), *cert. denied*, 112 S.Ct. 315 (1991); *Dysart v. State*, 581 So.2d 541 (Ala. Crim. App. 1990), *writ denied*, 581 So.2d 545 (Ala. 1991); *Stariks v. State*, 572 So.2d 1301 (Ala. Crim. App. 1990).

[8] *See State v. Culver*, 444 N.W.2d 662 (Neb. 1989); *State v. Oliviera*, 534 A.2d 867 (R.I. 1987); *Eiland v. State*, 1992 WL 108142 (Md. Ct. Spec. App. May 26, 1992); *Hannan v. Commonwealth*, 774 S.W.2d 462; *State*

The state of the law thus presents a classic scenario for review by this Court: numerous decisions below in a state of fundamental conflict over a basic and recurrent issue of constitutional criminal procedure. Either *Batson* applies to gender, or it does not, and only this Court can resolve the issue. Otherwise, criminal defendants will continue to receive disparate treatment depending on the jurisdiction in which they are prosecuted.

2. The need for a rule on the proper scope of *Batson* is particularly urgent with respect to sex-related crimes, a controversial area in which the number of reported crimes continues to escalate.[9] As the facts of Petitioner's case illustrate, attorneys in sexual abuse prosecutions are particularly inclined to base peremptory challenges solely on the gender of prospective jurors, in

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v. Clay, 779 S.W.2d 673 (Mo. Ct. App. 1989); *State v. Adams*, 533 So.2d 1060 (La. Ct. App. 1988), *cert. denied*, 540 So.2d 388 (La. 1989). Still more states have recognized that the precise scope of *Batson* remains to be resolved. *See Nelson v. United States*, 601 A.2d 582 (D.C. 1991); *State v. Gonzalez*, 808 P.2d 40.

[9] *See, e.g.*, U.S. Bureau of the Census, *Statistical Abstract of the United States: 1991*, at 176, 182 (111th ed. 1991) (showing roughly five-fold increase in number of reports of sexual maltreatment of children from 1976 to 1986, and 13.9 percent increase in number of forcible rapes reported from 1980 to 1989); National Institute of Justice, *When the Victim is a Child 4* (2d ed.) ("the number of child sexual abuse allegations known to child protection agencies has been rising steadily since 1976"); Federal Bureau of Investigation, *Crime in the United States*, Uniform Crime Reports 1990, at 16 (1991) (forcible rape arrests increased 9 percent nationwide from 1986 to 1990); *Estimate of Rape Victims Is Quintupled*, The Washington Post, April 24, 1992, at 20 (National Women's Study reports that "almost 62 percent of the rape victims said they were attacked when they were minors, with about 29 percent saying they were younger than 11.").

the same way that prosecutors before *Batson* were known to strike black venirepersons purely on the basis of race when the defendant was black.[10] The widespread striking of men or women from the venire in sexual abuse cases, however, threatens to cast public doubt on the fairness of these prosecutions, a concern that is critical to *Batson* and its progeny.[11] Beyond this, the lower courts need guidance on how to address not only claims of prejudice based on gender, but also future *Batson* challenges based on age, religion, or other equal protection classifications.

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[10] It is an enduring truism of trial practice that attorneys exercise peremptory challenges not for their theoretical purpose of ferreting out individual jurors who show an indication of bias, but on the basis of group affiliations that are assumed to dictate particular views. *See* J. Gobert & W. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* 455 (2d ed. 1990) (noting that Clarence Darrow counseled criminal defense lawyers to strike "Germans because 'they are bullheaded'; Swedes because 'they are stubborn'; Presbyterians because 'they know right from wrong but seldom find anything right'; and Lutherans, prohibitionists, and the wealthy because they are prone to convict." (quoting C. Darrow, *Attorney for the Defense*, 8 Esquire 35 (1936))). Today, lawyers are still urged not "to dismiss such stereotypical thinking about jurors as ill-informed and unfashionable [and forget] why stereotypes develop in the first place." *Jury Selection*, *supra*, at 455; *see also* F. Bailey & H. Rothblatt, *Successful Techniques for Criminal Trials* 104-05 (1971).

[11] *See Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991) ("The verdict will not be accepted or understood . . . if the jury is chosen by unlawful means at the outset."); *see also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (broad community participation on juries is "critical to public confidence in the fairness" of the system); *Peters v. Kiff*, 407 U.S. 493, 502-503 (1972) (discriminatory practices in jury selection "cast doubt on the integrity of the whole judicial process.").

3. On the merits, the Alabama Court of Criminal Appeals seriously erred in concluding that *Batson* does not apply to gender-based strikes. Contrary to the holding of some courts that *Batson* is restricted exclusively to race, this Court did not address the question of gender-based strikes in *Batson* because the issue simply was not raised in that case.[12] In fact, the principles underlying *Batson* are anything but static, as illustrated by this Court's exploration of *Batson*'s contours in recent Terms.[13]

The prohibition of sexual discrimination in jury selection is a direct practical and logical consequence of *Batson*'s equal protection analysis. In *Batson* this Court reasoned that in addition to denying the defendant a trial before a jury chosen in a nondiscriminatory manner, race-based peremptory challenges (1) harm the excluded

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[12] *See Powers v. Ohio*, 111 S. Ct. at 1381 (Scalia, J., dissenting) (noting that "the precise scope of the exception [*Batson*] has created remains to be determined" and that it is unclear whether *Batson* "applies to peremptories based on the defendant's sex"); *United States v. De Gross*, 1992 WL 63082, at *13 n.6 (9th Cir. April 2, 1991) (en banc) (noting that "the Court's language [in *Batson*] was couched in racial terms. We believe that there is no more significance to that language than the fact that the case involved peremptory strikes against black venirepersons.").

[13] *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race); *Powers v. Ohio*, 111 S. Ct. 1364 (criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race); *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (finding no clear error in state court's approval of prosecutor's peremptory strikes against two Latino venirepersons in trial of Latino defendant); *Holland v. Illinois*, 493 U.S. 474 (1990) (*Batson* rule is not incorporated into Sixth Amendment).

venirepersons, (2) undermine public confidence in the judicial system, and (3) stimulate community prejudice. *See* 476 U.S. at 87-88. Peremptory strikes based solely on gender cause precisely the same evil effects because, like race-based challenges, they employ the imprimatur of government[14] to exploit a stereotype that bears no relationship to an individual's qualifications for jury service.

Although this Court has stated that *Batson* "was designed 'to serve multiple ends,'" *Powers v. Ohio*, 111 S. Ct. 1364, 1368 (1991) (citations omitted), its core value is that judgments about juror objectivity cannot be based on group presumptions, and both defendants and the community are ill served by group-based exclusions. Thus, in *Powers* this Court emphasized that the "raw fact of skin color. . . . cannot be a proxy for determining juror bias or competence." *Id.* at 1370. "A person's race simply 'is

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[14] Just as racial discrimination in the judicial system is a stimulant to community prejudice which impedes equal justice for racial minorities, see *Batson*, 476 U.S. at 87-88, so too is gender discrimination in the judicial system a stimulant to community prejudice which impedes equal justice for women and men. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. at 2085 ("By enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'") (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)). In doing so, the government "in a significant way has involved itself with invidious discrimination." *Edmonson*, 111 S. Ct. at 2085. *See also Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979) (like classifications based on race, gender classifications traditionally have the been the touchstone for pervasive and often subtle gender discrimination); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (males are a constitutionally cognizable group); *Reed v. Reed*, 404 U.S. 71, 75 (1971).

unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).[15]

This individuality principle need not extend to all classifications that have been recognized for purposes of equal protection, especially those that embody an element of voluntariness. Thus, for example, a person may have adopted pronounced views on specific issues, pursuant to a bona fide religious belief, that may support a peremptory challenge in a case that involved those issues.[16] The principle must apply, however, to the "raw fact" of gender, which, like race, is a genetically determined characteristic. Like race, a person's gender is simply unrelated to his or her ability to serve as a fair and impartial juror. *See Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (referring to "the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background"); *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

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[15] This principle was hardly new with *Batson*. In *Ballard v. United States*, 329 U.S. 187 (1946), the Court explained that "[j]ury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id.* at 193 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946)).

[16] Similarly, a person may adopt certain views or biases based upon his or her attainment or failure to attain a given economic status. The same conclusion applies to a person's political affiliation.

Finally, while it is true that this Court has applied different levels of scrutiny to equal protection challenges based on race and gender, so that the Constitution tolerates gender discrimination that is substantially related to the achievement of important governmental objectives, see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-441 (1985), gender-based peremptory strikes cannot meet this test. Peremptory challenges may be a necessary means for achieving the important objective of impaneling a fair and impartial jury, but challenges based solely on a venireperson's gender are not based on a party's impression of a particular venireperson's ability to be impartial. Rather, like racial challenges, they are based either on the false assumption that members of a certain group are unqualified to serve as jurors, see *Batson*, 476 U.S. at 86 (citing *Norris v. Alabama*, 294 U.S. 587, 599 (1935)), or on the false assumption that members of certain groups are unable impartially to consider the case against a member or nonmember of their group. *Cf. Batson*, 476 U.S. at 89 (assumption that members of a certain group are unable to consider a case against a member of their group is false). If the decision to exclude a juror is based solely on gender, the decision to exclude must necessarily be based on these false assumptions and does not aid in achieving an impartial jury. *See id.* at 98-99. Prohibiting discriminatory peremptory challenges will not undermine the contribution of peremptory challenges to the administration of criminal justice.[17]

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[17] Nor will enabling a criminal defendant to raise a *Batson* challenge based on gender divert the time and energy of parties or trial courts from the merits of a case any more than challenges based on racial discrimination. The claim of administrative difficulties was squarely rejected in *Batson*, *see* 476 U.S. at 99-100, which only requires the prosecution, if the defendant is able to raise an inference of

In sum, the Alabama Court of Criminal Appeals and other federal and state courts have misinterpreted this Court's decision in *Batson*, misapplied its purposes, and failed to recognize the serious harm that gender discrimination inflicts on our system of criminal justice. The erroneous decision below should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 1992

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discrimination, to articulate a non-discriminatory reason for the exercise of a particular strike. If the explanation is merely pretextual, the strike is disallowed. If the district court accepts the explanation, that is the end of the matter.

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1991-92

1910336

Ex parte Anthony P. Murphy

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Anthony Paul Murphy

v.

State)

(Montgomery Circuit Court, CC-87-1412, -1413)

PER CURIAM.

WRIT DENIED.

Hornsby, C.J., and Almon, Shores, Houston, Steagall, and Kennedy, JJ. concur.

Maddox, Adams, and Ingram, JJ., dissent.

Ex parte Anthony P. Murphy

MADDOX, JUSTICE (dissenting).

This petition for writ of certiorari presents one issue: whether the Court of Criminal Appeals erred in holding that the principle of *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply to the use of gender-based peremptory strikes. Because I believe that the *Batson* principle *does* extend to gender-based strikes, I would issue the writ and review the holding of the Court of Criminal Appeals to determine whether the State used its peremptory challenges in this case to exclude men from the trial jury solely because they were men.[1] I must respectfully dissent from the majority's decision to deny the writ of certiorari.

In dealing with the petitioner's gender-based argument, the Court of Criminal Appeals stated:

> "The appellant initially argues that the trial court erred in denying his *Batson* motion based on his allegation that males were improperly excluded from the jury. This issue has come before this court on more than one occasion. The law currently states that *Batson* does not extend to gender-based strikes. *Fisher v. State*, 587 So. 2d 1027 (Ala. Crim. App. 1991), writ denied, 587 So. 2d 1039 (Ala. 1991); *Daniels v. State*, 581 So. 2d 536 (Ala. Crim. App. 1990), writ denied, 581 So. 2d 541 (Ala. 1991); *Dysart v. State*, 581 So. 2d 541 (Ala. Crim. App. 1990), cert. denied, 581 So. 2d 545 (Ala. 1991); *Stariks v. State*, 572 So. 2d 1301 (Ala. Crim. App. 1990)."

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[1] The reasoning that I set forth in my dissenting opinion in *Ex parte Dysart*, 581 So.2d 545, 546 (Ala. 1991), applies with equal force today; however, I need not repeat that reasoning here.

Murphy v. State, [Ms. 90-648, October 11, 1991], ___ So. 2d ___ (Ala. Crim. App. 1991).

Based upon my reading of *Batson* and the cases of the United States Supreme Court extending *Batson*,[2] I conclude that *Batson* does apply to gender-based strikes. It appears to me, based on the various holdings of the United States Supreme Court, that when the issue of gender-based strikes is squarely presented to it, that Court will hold that the State, in a criminal case, cannot use its peremptory challenges to exclude either men or women, as a cognizable group, from jury service solely because of their sex.

One of the latest cases discussing the question of gender-based strikes is *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990). There, a female plaintiff, suing her former employer, had used her peremptory challenges to remove three males from the jury, the effect of which was to give her an all-female jury. The United States Court of Appeals for the Ninth Circuit held, in part, as follows:

> "...Sky Chefs asserts that its Fifth Amendment rights were violated by the plaintiff's use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury, relying on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We review this issue of law *de novo*, *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). We pay it particular attention since

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[2] *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364 (1991); *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077 (1991).

this court has recently extended the *Batson* equal protection right to gender-based peremptory challenges in criminal cases. *United States v. De Gross*, 913 F.2d 1417, 1423 (9th cir. 1990).

"....

"Petitioner, a corporation, cannot claim to be a member of the constitutionally protected class allegedly excluded from the jury, i.e., males. We need not reach the question of whether or not males are a constitutionally cognizable 'suspect class' since defendant is not even a member of that class. Although the Court has yet to rule on 'whether a defendant's race affects his standing to invoke *Batson*,' *Holland [v. Illinois]*, [____ U.S. ____, 110 S.Ct. 803, 107 L.Ed.2d 905] at [110 S.Ct.] 814 (Marshall, J., dissenting), we are aware of no authority that in an individual case a corporation (or even a male defendant) is entitled, under the equal protection clause, to a jury of any particular gender. *Cf. Apodaca v. Oregon*, 406 U.S. 404, 413, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972).

"Even if *Batson* were to be extended to allow black defendants to challenge peremptory strikes of white venirepersons or vice versa, *see Holland* [____ U.S. at ____, 110 S.Ct.] at 811-812 (Kennedy, J., concurring), [110 S.Ct. at] 813-814 (Marshall, J., dissenting, [110 S.Ct. at] 821-822 (Stevens, J. dissenting), it does not logically follow that corporations would be allowed the same latitude. Nothing in equal protection jurisprudence suggests that corporations should be considered a suspect class meriting heightened judicial

> review. *See, e.g., Railway Express Agency v. New York*, 332 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949). Sky Chefs has made no attempt to show that the peremptories were irrational or discriminatory against corporations alone."

919 F.2d at 1377-79.

The United States Supreme Court granted certiorari review in *Dias*, vacated the Court of Appeals' decision, and remanded the case for reconsideration in light of *Edmondson v. Leesville Concrete Co.*, ____ U.S. ____, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). *Powers v. Ohio*, ____ U.S. ____, 111 S.Ct. 1364 (1991), had already settled the question whether a defendant had to be a member of the excluded class. *Sky Chefs, Inc. v. Dias*, ____ U.S. ____, 111 S.Ct. 2791 (1991).

On remand, the Ninth Circuit, in *Dias*, found another reason not to reach the issue. It held that the defendant/employer had failed to *timely raise* the issue of the plaintiff/employee's use of peremptory challenges to remove venirepersons because they were men. *Sky Chefs*, 948 F.2d at 534. On March 9, 1992, the Supreme Court denied the defendant/employer's petition for the writ of certiorari. *Sky Chefs, Inc. v. Dias*, [Ms. 91-1167, March 9, 1992] ____ U.S. ____ (1992).[3]

Although I realize that most jurisdictions refuse to hold that the *Batson* principle is applicable to gender-based

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[3] The denial of certiorari review, in my opinion, means only that the Court would not review a constitutional claim that was not timely raised.

strikes,[4] and although I realize that there is apparent disagreement among the United States Courts of Appeals on the question,[5] I, nevertheless, believe that my dissenting views in *Ex parte Dysart*, 581 So.2d 545 (Ala. 1991), are sound, and that when the issue is squarely presented to the United States Supreme Court that Court will expand the *Batson* principle to apply to gender-based strikes in instances where men or women, as a cognizable group, are excluded from jury service solely because of their sex.

Dias was a *civil case*, involving a corporate defendant. This is a *criminal case* involving an individual. While I realize that the United States Supreme Court has refused to review the *Dias* decision after remand, it seems to me, in view of what the Supreme Court said when it remanded *Dias*, and what the Court said in other cases involving the application of *Batson*, that the *Batson* principle is applicable to this case. I believe that the *Batson* principle will ultimately be applied to a case such as this, because it would seem to me that a person's gender is completely unrelated to an individual's ability to participate on a jury and be impartial.

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[4] See, e.g., *State v. Pullen*, 811 S.W. 2d 463 (Mo. App. 1991); *State v. Harris*, 805 P. 2d 769 (Utah App. 1991); *Mowbray v. State*, 788 S.W. 2d 658 (Tex. App. 1990); *Hannan v. Commonwealth*, 774 S.W. 2d 462 (Ky. App. 1990); *Hodges v. State*, 27 Ark. App. 154, 767 S.W. 2d 541 (1989); and *State v. Olivera*, 534 A.2d 867 (R.I. 1987).

[5] See, *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988); *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990); and *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991).

Furthermore, even assuming there may be no fundamental right, under the federal constitution upon which a defendant might challenge the State's use of its peremptory challenges to exclude men or women, as a class, from jury service solely because of their sex, there is at least one independent reason why such a procedure is impermissible in Alabama. Alabama's policy regarding the right of a person not to be excluded from jury service is plain: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, *sex*, national origin or economic status." Ala. Code 1975, § 12-16-56.

Based on the foregoing, I would grant the writ; consequently, I must respectfully dissent.

Adams and Ingram, JJ., concur.

Released March 20, 1992
Clerk, Supreme Court of Alabama

APPENDIX B

THE STATE OF ALABAMA —
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1991-92

CR 90-648

Anthony Paul Murphy

v.

State

Appeal from Montgomery Circuit Court
(CC-87-1412, 87-1413)

TAYLOR, JUDGE

The appellant, Anthony Paul Murphy, was convicted of sodomy in the first degree and sexual abuse in the first degree. He was sentenced to 10 years in prison on the sexual abuse charge and life in prison on the sodomy charge, the sentences to run consecutively. On appeal the appellant presents three issues.

The appellant initially argues that the trial court erred in denying his *Batson* motion based on his allegation that males were improperly excluded from the jury. This issue has come before this court on more than one occasion.

The law currently states that *Batson* does not extend to gender-based strikes. *Fisher v. State*, [Ms. 1 Div. 948, March 1, 1991], _____ So.2d ____ (Ala. Cr. App. 1991), writ denied, [Ms. 1901499, September 13, 1991], ____ So.2d ____ (Ala. 1991); *Daniels v. State*, 581 So.2d 536 (Ala. Cr. App. 1990), writ denied, 581 So.2d 541 (Ala. 1991); *Dysart v. State*, 581 So.2d 541 (Ala. Cr. App. 1990), cert. denied, 581 So.2d 545 (Ala. 1991); *Stariks v. State*, 572 So.2d 1301 (Ala. Cr. App. 1990).

II

The appellant next contends that the trial court erred in defining "reasonable doubt" for the jury. The appellant maintains that the court's instruction violated the United States Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The appellant contends that the following instruction constituted reversible error:

> "Now, you will observe, ladies and gentlemen of the jury, that the state is not required to convince you of the defendant's guilt beyond all doubt but simply beyond all reasonable doubt and to a moral certainty. Beyond a reasonable doubt means beyond a doubt for which a real and *substantial reason* may be given. This is the law.
>
> "....
>
> "Ladies and gentlemen, whatever verdicts you reach -- If the state has proven the case beyond a reasonable doubt and to a moral certainty and proven the elements of the offense, it will be your duty to

return a verdict of guilty as to the charge or charges proven. If the state does not prove either or both of the offenses beyond a reasonable doubt and to a moral certainty, it will be your duty to return a verdict of not guilty as to any charge or charges the state does not prove."

(R. 289-90.)

The appellant maintains that the court's use of the term "substantial doubt" several times in its instruction lessened the degree necessary to convict him of the crimes charged. We do not agree. The United States Supreme Court in *Cage v. Louisiana* stated the following:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. *When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.*"

Cage, 111 S.Ct. at 329-30. (Emphasis added.)

This Court recently held in *Adams v. State* [Ms. 90-367, May 31, 1991], ___So.2d___ (Ala. Cr. App. 1991), and *Williams v. State*, [Ms. 89-191, June 14, 1991], ___So.2d ___ (Ala. Cr. App. 1991), that the use of some of the terminology used in *Cage* does not automatically render

the instruction impermissible under *Cage*. As this court stated in *Adams*:

> "In *[Cage]* the United States Supreme Court held that when the terms 'substantial doubt' and *'grave uncertainty'* are considered with the reference to the term 'moral certainty,' a reasonable juror could find that the degree of proof required to convict is less than that required by the Due Process Clause. (Emphasis added in *Adams*.)"

Adams, ___ So.2d at ___.

It is clear from a review of the instruction that the trial court did not violate the Supreme Court's holding in *Cage*. A review of the trial court's instruction as a whole shows that the trial court adequately charged the jury on the definition of "reasonable doubt."

III

The appellant further contends that the trial court erred in allowing one of the state's witnesses to testify. Specifically, the appellant contends that the witness was not competent to testify at trial.

"A presumption of competency attends a witness. *Smith v. State*, 380 So.2d 345 (Ala. Cr. App. 1980). '"The court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, insanity, drunkenness or infancy.' It has been held that a trial judge's ruling on this question stands on appeal unless there is strong evidence of an abuse of sound discretion." C. Gamble, *McElroy's Alabama Evidence* § 92.01(2) (4th

ed. 1991), quoting § 12-21-165(6), Code of Alabama 1975. "The burden of proving the incompetency of a witness is upon the party objecting." *Smith*, 380 So.2d at 348.

In the instant case, prior to state's witness Bobby Spurlin's testifying, the witness was questioned extensively concerning his competency. The witness was 18 years old and was in special education classes. It is clear from his answers that he understood the difference between telling the truth and telling a lie. It is also clear that he understood that he was bound to tell the truth on the witness stand. We see no reason why the witness would not be competent to testify. "In each particular case where the competency of a witness is challenged the fundamental question is whether 'the derangement or defect is such as to make the person highly untrustworthy as a witness.'" *Smith*, 380 So.2d at 347. We do not believe after an examination of Spurlin's testimony that his testimony would be "highly untrustworthy."

The appellant maintains that since the witness could not correctly define the word "oath" and had trouble remembering a name that he was incompetent as a witness. We do not agree. "The particular defects in the witness's capacity to observe and remember went to [his] credibility and were matters for the Jury." *Smith*, 380 So.2d at 348. The witness was correctly permitted to testify.

For the reasons stated above, the appellant's conviction is due to be affirmed.

Affirmed.

Patterson P.J., McMillan J., concur. Bowen J., dissents with opinion.

BOWEN, JUDGE, DISSENTING

I dissent from Part I of the opinion in which the majority concludes that "*Batson* does not extend to gender based strikes."

I adhere to my position that gender discrimination is prohibited under state law. See *Daniels v. State*, 581 So.2d 536, 540-41 (Ala.Cr.App. 1991) (Bowen, J., concurring in part and dissenting in part), cert. denied, 581 So. 2d 541 (Ala. 1991), and *Fisher v. State*, [Ms. 1 Div. 948, March 1, 1991] ___ So.2d ___, ____ (Ala.Cr.App.) (Bowen, J., concurring specially[6]), cert. denied, [Ms. 1901499,

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[6] I concurred specially in *Fisher*, explaining that a dissent would be a "futile gesture" in light of the decision of the Alabama Supreme Court in *Ex parte Bankhead*, [Ms. 89-1179, February 15, 1991]. In that opinion, the Court held that a white defendant did not have standing to challenge the prosecutor's use of his peremptory strikes to remove black venire members from the jury. The court stated that "the defendant's group identity must correlate with the identity of the group excluded from the jury in order to establish an equal protection claim." I quoted this language in my concurrence in *Fisher*, noting that the defendant in *Fisher* was a male who challenged the prosecutor's use of peremptory strikes to remove females. On May 24, 1991, the Alabama Supreme Court granted rehearing in *Bankhead*, withdrew its original opinion, and substituted a new opinion in which it held, following *Powers v. Ohio*, ___ U.S. ___, 110 S.Ct. 1109, 107 L.Ed.2d 1019 (1990), that a white defendant did have standing to challenge the removal of black venire members from the jury. *Ex parte Bankhead*, [Ms. 89-1179, May 24, 1991] ___ So.2d ___, ___ (Ala. 1991). The language from the original

September 13, 1991] ___ So. 2d ___ (Ala. 1991). See also *Ex parte Fisher*, [Ms. 1901499, September 13, 1991] ___ So.2d ___ (Ala. 1991) (Maddox, J., dissenting); *Ex parte Dysart*, 581 So.2d 545, 546-47 (Ala. 1991) (Maddox, J., dissenting).

Released Oct. 11, 1991
Clerk, Ala. Court Criminal Appeals

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opinion that I quoted in *Fisher* was obviously deleted from the rehearing opinion.

APPENDIX C

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals **No. 90-648**
(Montgomery Circuit Court No. 87-1412;1413)

Anthony P. Murphy vs. **State of Alabama**
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on **November 15, 1991**, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled.** Rule 39(k) motion **denied. No opinion.**

LANE W. MANN
CLERK
COURT OF CRIMINAL APPEALS

LWM:k1

Hon. William R. Blanchard
505 South Perry Street
P.O. Box 746
Montgomery, AL 36101-0746